

ARKANSAS SUPREME COURT

No. CR 07-40

NOT DESIGNATED FOR PUBLICATION

THEODORE GIPSON
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered February 15, 2007

PRO SE MOTION FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [CIRCUIT COURT OF
ARKANSAS COUNTY, SOUTHERN
DISTRICT, CR 2004-59, HON. DAVID
G. HENRY, JUDGE]

APPEAL DISMISSED; MOTION
MOOT.

PER CURIAM

In 2005, appellant Theodore Gipson was found guilty by a jury of commercial burglary and theft of property for which he was sentenced as a habitual offender to an aggregate term of 840 months' imprisonment. Fines totaling \$25,000.00 were also imposed. The Arkansas Court of Appeals affirmed. *Gipson v. State*, CACR 05-1266 (Ark. App. Sept. 20, 2006).

Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Criminal Procedure Rule 37.1, which was denied. Appellant has lodged an appeal from that order in this court. He now requests a copy of the transcript of his trial and the record lodged in this appeal to prepare the appellant's brief. As it is clear that the appeal is without merit, the appeal is dismissed. The motion is moot. This court has consistently held that an appeal from the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*);

Seaton v. State, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*).

The Rule 37.1 petition contained the following allegations pertaining to counsel's representation at trial:

My lawyer did not make a motion to suppress on the grounds of illegal search and seizure; my lawyer did not ask for a continuance when our witness who was subpoena (sic) did not show up; my lawyer allowed the court to reconvene without me; my lawyer allowed the prosecutor to introduce evidence that was not produced; my lawyer allowed professional testimony about items never produced; my lawyer allowed me to be sentenced illegally; my lawyer did not make a motion to strike Officer Lock's testimony; my lawyer's work load was too heavy that (sic) why he removed [himself] from the case; my second lawyer was not familiar with the case and never talked to me.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Under the criteria for assessing the effectiveness of counsel as set out in *Strickland*, when a convicted defendant complains of ineffective assistance of counsel, he must show first that counsel's performance was deficient through a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Additionally, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, *i.e.*, that the decision reached would have been different absent the errors. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). Because of this standard, the burden is on the petitioner to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* at 413, 39 S.W.3d at 795. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark.359, 105 S.W.3d 352 (2003).

In the instant case, the trial court correctly held that the allegations of ineffective assistance of counsel were conclusory in nature and thus not a ground for postconviction relief under Rule 37.1. As the court noted, counsel did indeed file a motion to suppress evidence obtained as a result of appellant's arrest, and, if there were some other basis for the suppression motion not raised by counsel, it was incumbent on appellant to explain the grounds on which the motion should have been based. Likewise, with respect to the other claims of ineffective assistance of counsel, appellant failed entirely in his burden to demonstrate the impact of counsel's conduct. For example, he did not explain what testimony the witness who failed to appear would have given, what the significance of the witness's testimony would have been to the defense, or why the absence of the witness merited a continuance. Appellant's failure to support his allegations with facts from which it could be concluded that his defense was prejudiced was fatal to his assertion that he was not afforded effective

assistance of counsel at trial.

In addition to the claims of ineffective assistance of counsel, appellant raised three claims of trial error: that evidence was adduced pursuant to an unconstitutional search and seizure of his car; that the prosecutor talked of evidence never brought forth and called a professional witness to testify about evidence never produced; and that he was denied the right to be present at all parts of the hearings and trial in his case. The three issues were clearly of the sort that could have been addressed fully at trial and on the record on direct appeal if raised below. It is well settled that trial error, even if error of constitutional dimension, is not sufficient to warrant granting postconviction relief if the issue was raised, or could have been raised, at trial and on the record on appeal. *Taylor v. State*, 297 Ark. 627, 764 S.W.2d 447 (1989) (*per curiam*).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene, supra*. A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). Here, it is plain that the trial court did not err when it denied appellant's petition. Accordingly, appellant could not prevail on appeal.

Appeal dismissed; motion moot.